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No. 07-513

IN THE
Supreme Court of the United States

BENNIE DEAN HERRING,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

PAMELA HARRIS
Counsel of Record
Co-Chair, Amicus Committee
NACDL
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

WALTER DELLINGER*
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE CLINIC

* *May be contacted at O'Melveny & Myers LLP*

JOSEPH BLOCHER**
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

** *Not admitted in D.C.; supervised by principals of the firm*

Attorneys for Amicus Curiae

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CASES

Alderman v. United States,
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Arizona v. Evans,
514 U.S. 1 (1995).....passim

California v. Willis,
46 P.3d 898 (2002) 21, 26

Dickerson v. United States,
530 U.S. 428 (2000)..... 4, 7

Elkins v. United States,
364 U.S. 206 (1960).....9, 12, 14, 27

Harlow v. Fitzgerald,
457 U.S. 800 (1982)..... 14

Hudson v. Michigan,
547 U.S. 586 (2006).....passim

Mapp v. Ohio,
367 U.S. 643 (1961).....passim

Missouri v. Seibert,
542 U.S. 600 (2004)..... 13, 16

Monell v. Dep't of Soc. Servs.,
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Nebraska v. Hisey,
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Nix v. Williams,
467 U.S. 431 (1984)..... 6

Pennsylvania Bd. of Prob. & Parole v. Scott,
527 U.S. 357 (1984)..... 5, 6

Segura v. United States,
468 U.S. 796 (1984)..... 5

TABLE OF AUTHORITIES
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Page(s)

Shadler v. State,
761 So. 2d 279 (2000)..... 25, 26

Silverthorne Lumber Co. v. United States,
251 U.S. 385 (1920)..... 4

Stone v. Powell,
428 U.S. 465 (1976)..... 6, 8

Terry v. Ohio,
392 U.S. 1 (1968)..... 9, 13

United States v. Calandra,
414 U.S. 338 (1974)..... 5, 9

United States v. Hensley,
469 U.S. 221 (1985)..... 27

United States v. Janis,
428 U.S. 433 (1976)..... 6, 12

United States v. Leon,
468 U.S. 897 (1984).....passim

Weeks v. United States,
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Wolf v. Colorado,
338 U.S. 25 (1949)..... 4

Wong Sun v. United States,
371 U.S. 471 (1963)..... 5, 6

OTHER AUTHORITIES

Roger Amsden, *Police Cooperation Helps Nab Armed Robbery Suspects*,
Union Leader (Manchester, NH),
Oct. 1, 2004 23

Michael Avery, David Rudovsky & Karen Blum, Police Misconduct (3d ed. 2007) 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Ben Benton, *Police Cooperation Pays Off*, Chattanooga Times Free Press, Dec. 14 2006 23

Donald Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. Mich. J.L. Ref. 591 (1990) 16

William A. Geller & Norval Morris, *Relations between Federal and Local Police*, 15 Crime & Just. 231-348 (1992) 23

Herman Goldstein, *Confronting the Complexity of the Policing Function in* Discretion in Criminal Justice: The Tension Between Individualization and Uniformity (Lloyd E. Ohlin & Frank J. Remington, eds. 1993) 25

Petter Gottschalk, *Stages of Knowledge Management Systems in Police Investigations*, 19 Knowledge-Based Sys. 381-87 (2006) 22

Int'l Ass'n of Chiefs of Police, Criminal Intelligence Sharing: A National Plan for Intelligence-led Policing at the Local, State and Federal Levels (2002) 22

Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a Principled Basis Rather than an Empirical Proposition*, 16 Creighton L. Rev. 565 (1983) 9

TABLE OF AUTHORITIES
(continued)

Page(s)

1 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2d. ed. 2003) 19, 28, 29

Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345 (2000) 15

Saul Levmore & William J. Stuntz, *Remedies and Incentives in Public and Private Law: A Comparative Essay*, 1990 Wis. L. Rev. 483 (1990) 15

Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24 (1980) 11

Tan Woei Luen, *Knowledge Management in the Public Sector: Principles and Practices in Police Work*, 27 J. Info. Sci. 311-318 (2001) 22

Heather Morton, Integrated Criminal Justice Information Systems, National Conference of State Legislatures (2001) 24

Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 Tex. L. Rev. 939 (1966) 10

Office of Justice Programs, Justice Information Sharing Initiatives: A White Paper (2004) 22

TABLE OF AUTHORITIES
(continued)

Page(s)

Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision Makers*, *in* Discretion in Criminal Justice: The Tension Between Individualization and Uniformity (Lloyd E. Ohlin & Frank J. Remington, eds. 1993) 25

Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75 (1992)..... 11

Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753 (1993)..... 16

L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669 (1998)..... 9

Police Cooperation in Region Leads to Solving Robberies, Conn. Post (Bridgeport), Oct. 7, 2007 23

A. Kenneth Pye, *Charles Fahy and the Criminal Law*, 54 Geo. L.J. 1055 (1966)..... 17

Michael Redmond & Alok Baveja, *A Data-driven Software Tool for Enabling Cooperative Information Sharing Among Police Departments*, 141 Eur. J. Operational Res. 660-678 (2002)..... 24

TABLE OF AUTHORITIES
(continued)

Page(s)

Aki Roberts & John M. Roberts Jr., *The Structure of Informal Communication Between Police Agencies*, 30 Policing: Int'l J. Police Strategies & Mgmt. 93-107 (2007) 25

Malcolm Russell-Einhorn, et al., Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999, National Institute of Justice, NCJ 201782 (2000) 23

Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, Crim. Just. Ethics, Summer/Fall 1982..... 10

David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 Ohio St. J. Crim. L. 567 (2008) 12, 16, 17

Arlen Specter, Mapp v. Ohio: *Pandora's Problems for the Prosecutor*, 111 U. Pa. L. Rev. 4 (1962)..... 10

Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820 (1994) 9

Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365 (1983)..... 12, 13

Roger Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 Duke. L.J. 319 (1962)..... 14

TABLE OF AUTHORITIES
(continued)

Page(s)

Samuel Walker, Op-Ed, L.A. Times, June 25, 2006 16

Alexander Weiss, Informal Information Sharing Among Police Agencies, National Institute of Justice (1998) 23

INTEREST OF THE AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of more than 11,000 attorneys, with an additional 28,000 affiliate members in every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating NACDL's substantial interest in criminal procedure and in preserving the procedural and evidentiary mechanisms necessary to ensure fairness in the criminal justice system.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

For nearly a century, and in dozens of cases, this Court has insisted that the exclusionary rule is an essential remedy for Fourth Amendment violations. The rule encourages compliance with the Fourth Amendment in the most effective way—by removing the incentive for police to disregard it.

Accordingly, while the Court has excepted from the exclusionary rule certain violations arising from errors made by non-law-enforcement personnel, *see United States v. Leon*, 468 U.S. 897 (1984), it has never applied that rule when it is the police themselves who are at fault. Nor should it here. As is conceded in this case, the error underlying Herring's unconstitutional arrest is attributable to an "adjunct to law enforcement"—for purposes of the exclusionary rule, a police officer. Pet. App. 8a. Under those circumstances, as the Court's precedent indicates and empirical research confirms, the exclusionary rule operates precisely as intended, as an effective deterrent to future *police* misconduct.

Nor should the Court accept the invitation of the United States to carve out a new exclusionary rule exception for collaborative police conduct that occurs across jurisdictional lines. Whether they work alone, with partners in their own departments, or with fellow officers from other departments, police officers remain members of "the law enforcement team," *Leon*, 468 U.S. at 917, fully subject to the deterrent effects of the exclusionary rule. Today's law enforcement operates collectively, and it can be deterred collectively, as well. To hold otherwise would badly undermine the deterrent effect of the exclusionary rule, giving officers new and perverse incen-

tives to engage in unlawful cross-departmental conduct without fear of the exclusionary sanction.

I. THE EXCLUSIONARY RULE REMAINS A NECESSARY REMEDY FOR FOURTH AMENDMENT VIOLATIONS.

A. For Nearly A Century, This Court Has Required Exclusion Of Unconstitutionally Seized Evidence.

In dozens of cases over the past 100 years, this Court has reaffirmed that the exclusionary rule is a necessary remedy for Fourth Amendment violations. The Court has limited application of the exclusionary rule in some circumstances, and created certain categorical exceptions to the rule, but it has never questioned the essential role of the exclusionary rule in effectuating the protections of the Fourth Amendment. *Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

1. Application of the exclusionary rule in federal proceedings—like the one at issue in this case—has been a matter of settled law for almost a century. In *Weeks v. United States*, 232 U.S. 383 (1914), this Court applied the exclusionary rule to prohibit the introduction in a federal proceeding of evidence seized in violation of the Fourth Amendment. The Court tied the exclusionary rule directly to the substantive protections of the Fourth Amendment, reasoning that "[i]f [evidence] can thus be [unlawfully] seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value,

and, so far as those thus placed are concerned, might as well be stricken from the Constitution." *Id.* at 393; *see also Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (Holmes, J.) (applying exclusionary rule in federal proceeding because without the rule, "the Fourth Amendment [is reduced] to a form of words").

It was only with respect to state proceedings that the exclusionary rule issue remained unsettled after the earliest part of the 20th century. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court initially declined to extend the exclusionary rule to state criminal proceedings. But in 1961, in *Mapp v. Ohio*, 367 U.S. 643, the Court finally resolved the issue, overruling *Wolf* and holding that the exclusionary rule is enforceable against the states as an intrinsic part of the Fourth Amendment itself. As in the federal context, the Court reasoned that the exclusionary rule was necessary to give practical meaning to the Fourth Amendment's substantive provisions. Quoting Justice Holmes's opinion in *Silverthorne*, the *Mapp* Court described the exclusionary rule as a "clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'" *Mapp*, 367 U.S. at 648.

Since *Mapp*, the Court has consistently applied the exclusionary rule against the states, reaffirming the exclusionary rule's essential role in enforcing underlying Fourth Amendment rights. *Cf. Dickerson v. United States*, 530 U.S. 428, 438 (2000) (constitutional status of *Miranda* rule confirmed by continued application of rule against the states). It has extended the exclusionary rule beyond evidence

obtained directly as a result of an unconstitutional search or seizure to reach evidence only indirectly derived from a Fourth Amendment violation. *See Segura v. United States*, 468 U.S. 796, 804 (1984) ("[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, but also evidence later discovered and found to be derivative of an illegality or 'fruit of the poisonous tree.'") (internal citation omitted)); *Wong Sun v. United States*, 371 U.S. 471 (1963). And the Court has never questioned the continued validity of the proposition that "the exclusionary rule . . . generally prohibits the introduction at criminal trial of evidence obtained in violation of a defendant's Fourth Amendment rights." *See Pa. Bd. of Prob. and Parole v. Scott*, 524 U.S. 357, 359 (1998).

2. More recent of the Court's cases have built on the early reasoning of *Weeks* and *Mapp* to make clear that the exclusionary rule is "designed to safeguard Fourth Amendment rights generally through its deterrent effect." *Leon*, 468 U.S. at 906 (internal quotation omitted); *see also United States v. Calandra*, 414 U.S. 338, 347 (1974) ("prime purpose" of exclusionary rule is to "deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures"). Accordingly, the Court has limited application of the exclusionary rule where it believes the "rule can be modified somewhat without jeopardizing its ability to perform its intended [deterrent] functions." *Leon*, 468 U.S. at 905.

Most pertinent here, the Court has concluded that where a police officer reasonably relies on a search warrant made defective by a magistrate's

mistake, or an arrest warrant proffered in error by a court employee, application of the exclusionary rule would have no cognizable deterrent effect and is thus unjustified. *Leon*, 468 U.S. at 906-07 (weighing deterrent benefits against costs of exclusion when officer relies on defective warrant); *Arizona v. Evans*, 514 U.S. 1, 14 (1995) (applying *Leon* to error by court clerk). Similarly, the Court has held the exclusionary rule inapplicable where evidence is obtained through means independent of police misconduct, or would inevitably have been discovered even absent police misconduct, on the theory that the exclusionary sanction is not necessary for deterrence in such cases. *See Wong Sun*, 371 U.S. 471 (independent source); *Nix v. Williams*, 467 U.S. 431 (1984) (inevitable discovery).[2]

Most recently, the Court held in *Hudson v. Michigan*, 547 U.S. 586 (2006), that the exclusionary rule generally does not apply to violations of the constitutional "knock-and-announce" requirement. The Court reasoned that the interests protected by the knock-and-announce rule do not include the privacy interests normally implicated by an unlawful search. 547 U.S. at 593-94. Accordingly, a no-knock search is not the "unattenuated caus[e]" of any privacy intrusion that occurs when the police find and seize evidence. *Id.* at 594; *see also id.* at 592 (ques-

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[2] On similar reasoning, the Court has declined to apply the exclusionary rule to certain categories of proceedings, holding that the exclusionary rule's deterrent function is fully served by application of the rule in core criminal proceedings. *See, e.g.*, *Pa. Bd. of Prob. & Parole*, 524 U.S. 357 (exclusionary rule inapplicable in parole revocation proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (civil tax proceedings); *Stone v. Powell*, 428 U.S. 465 (1976) (habeas proceedings).

tioning whether no-knock search is "but-for" cause of obtaining evidence). In that sense, *Hudson* does not create an "exception" to the exclusionary rule at all, but simply applies the well-established proposition that evidence need not be excluded if its discovery is not the direct and "unattenuated" result of unlawful police conduct.

These post-*Mapp* cases have limited the scope of the exclusionary rule. But what is important here is that none has called into question the continued vitality of the exclusionary rule or the rule's application in cases of unlawful police behavior tied directly to the recovery of incriminating evidence. *See Hudson*, 547 U.S. at 612-13 (Breyer, J., dissenting). As with the *Miranda* rule, "[i]f anything, [the Court's] subsequent cases have reduced the impact of the . . . [exclusionary] rule on legitimate law enforcement while reaffirming the . . . core" of the rule. *Dickerson*, 530 U.S. at 443.

3. Although some members of this Court have raised questions regarding the continued vitality of the exclusionary rule, *see Hudson*, 547 U.S. at 594-99, the exclusionary rule, like the *Miranda* rule, "has become embedded in routine police practice to the point where [it] ha[s] become part of our national culture," *Dickerson*, 530 U.S. at 443 (declining to overrule *Miranda*); *Hudson*, 547 U.S. at 613 (Breyer, J., dissenting) ("The Court has decided more than 300 Fourth Amendment cases since *Weeks*," finding violations "in nearly a third of them," and "either explicitly or implicitly upheld (or required) the suppression of evidence at trial" in all but those subject to certain categorical exceptions). There is no "special justification" for transgressing the principle of *stare decisis*, *see Dickerson*, 530 U.S.

at 443, and overruling the *Weeks* rule, firmly established since 1914. On the contrary, the exclusionary rule is a settled part of law-enforcement practice and a crucial guarantor of Fourth Amendment rights. *See Hudson*, 547 U.S. at 603 (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

B. The Exclusionary Rule Effectuates The Fourth Amendment's Guarantees By Deterring Violations.

The exclusionary rule deters police misconduct in a straightforward and effective way: it reduces the value of evidence obtained as a result of Fourth Amendment violations, and thus eliminates what otherwise would be a powerful incentive for police to engage in such violations. Or, as the Court explained in *Stone v. Powell*, "the immediate effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment by removing the incentive to disregard it." 428 U.S. at 492.

Contrary to the assumption of the court below, *see* Pet. App. 10a, the exclusionary rule works to deter negligent as well as intentional illegality. So long as the exclusionary rule applies, the police have no incentive to engage in willful Fourth Amendment violations to build a case for trial—and every incentive to invest the resources necessary to avoid negligent violations that might undermine prosecutions. *Cf. Alderman v. United States*, 394 U.S. 165, 175-76 (1969) (exclusionary rule applies to "unlawful wiretapping or eavesdropping, whether deliberate or negligent").

Empirical research confirms what logic and precedent indicate: The exclusionary rule continues to effectuate its "prime purpose" of "deter[ring] future unlawful police conduct and thereby effectuat[ing] the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Calandra*, 414 U.S. at 347.[3]

1. Perhaps the most striking evidence of the exclusionary rule's effectiveness is the change identified by *Hudson*, 547 U.S. at 598-99: the wave of improvements in police training that followed the Court's application of the exclusionary rule to the states in *Mapp*. Indeed, even scholars hostile to the exclusionary rule have recognized this effect. *See*, *e.g.*, L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 Iowa L. Rev. 669, 710-11 (1998) ("*Mapp* has probably made officers more aware of the Fourth Amendment, and

[3] While the exclusionary rule is an essential tool for deterring unconstitutional law-enforcement conduct, it also serves other important ends. *See* Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a Principled Basis Rather than an Empirical Proposition*, 16 Creighton L. Rev. 565, 598-606 (1983) (discussing non-deterrence rationales for exclusionary rule). Indeed, before narrowing its focus to the deterrence rationale, the Court itself recognized that the exclusionary rule furthers the "imperative of judicial integrity" by ensuring that the courts do not ratify unconstitutional searches and seizures by admitting the evidence that results. *Elkins v. United States*, 364 U.S. 206, 222 (1960); *see also Terry v. Ohio*, 392 U.S. 1, 13 (1968) ("Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions."). The exclusionary rule also serves a critical law-development function, ensuring that questionable searches and seizures are presented to judges during the course of criminal trials, so that courts can continue to formulate a comprehensive body of Fourth Amendment doctrine. *See* Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 851-52 (1994).

has increased the number of warrants they obtain . . . . ").

Some of the most striking evidence of *Mapp*'s effect on police training comes from first-hand accounts of law-enforcement personnel. Michael Murphy, New York City's police commissioner at the time of *Mapp*, recounted that the decision had a "dramatic and traumatic effect" on the police. Michael J. Murphy, *Judicial Review of Police Methods in Law Enforcement: The Problem of Compliance by Police Departments*, 44 Tex. L. Rev. 939, 941 (1966). In the wake of the decision, Commissioner Murphy immediately undertook a reevaluation of existing training procedures, developed new policies, and held retraining sessions. And he observed a sharp uptick in the use of search warrants in response to the reinforced stringency of the Fourth Amendment that came with *Mapp*. *Id*. at 941-42.

Similarly, then-Philadelphia District Attorney Arlen Specter described *Mapp* as "the most significant event in criminal law since the adoption of the fourteenth amendment," and said that it "revolutionized" the practices of police and prosecutors. Arlen Specter, Mapp v. Ohio: *Pandora's Problems for the Prosecutor*, 111 U. Pa. L. Rev. 4, 4 (1962). Other prosecutors have likewise attested to the ongoing deterrent benefits of the rule. *See, e.g.*, Stephen H. Sachs, *The Exclusionary Rule: A Prosecutor's Defense*, Crim. Just. Ethics, Summer/Fall 1982, at 28-30 ("I have watched the rule deter, routinely, throughout my years as a prosecutor.").

2. Empirical studies confirm the exclusionary rule's deterrent effects. After undertaking a thorough investigation of the New York City Police De-

partment, for instance, Professor Milton Loewenthal concluded that the exclusionary rule "support[s] the credibility of the courts and the law in the mind of the police officer," and overall, "acts as a significant, albeit reasonable, deterrent to illegal police searches" that officers accept as a "necessary fact of life." Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. Rev. 24, 38-39 (1980).

Professor Myron Orfield's study of Chicago police officers reached a similar result, finding that the rule had "significant deterrent effects" on both an individual and an institutional level. Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. Colo. L. Rev. 75, 79-80 (1992). Orfield documented individual police officers' awareness of, and reaction to, the exclusionary rule, and found that officers indicated that they "experience[d] adverse personal reactions" when the suppression of illegally obtained evidence interfered with a conviction. *Id*. at 80. At the institutional level, Orfield found that police supervisors and prosecutors responded to the rule by developing new compliance programs. *Id*. The combined effect, Orfield concluded, was that while police perjury remains a problem, "because of the exclusionary rule, [the police] often obey the Fourth Amendment. By any measure, this is an improvement" over the pre-*Mapp* regime. *Id.* at 132.

3. This empirical evidence of the exclusionary rule's efficacy is particularly striking given the difficulty of "proving a negative"—that an illegal search or seizure that has *not* been conducted would have been conducted but for the exclusionary rule. As

the Court has recognized, it is "hardly likely that conclusive factual data could ever be assembled" on the issue. *Elkins*, 364 U.S. at 218; *see also* Pet. App. 7a ("empirical evidence of the rule's deterrent effect is difficult, if not impossible, to come by"). In this post-*Mapp* world, "all possibility of broad-scale controlled or even semi-controlled comparison studies has been eliminated." *Janis*, 428 U.S. at 451-52.

That said, it is possible to learn from the police response when the threat of exclusion is lifted in a particular class of cases. For example, after this Court held that only defendants whose own personal rights had been violated could invoke the exclusionary remedy, *see Alderman*, 394 U.S. 165, the government expressly encouraged law-enforcement agents to "purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence [that could be introduced] against third parties." Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1403 n.201 (1983) (*citing United States v. Payner*, 447 U.S. 727, 730 (1980)). Similarly, after a 1982 California ballot initiative permitted the admission of evidence seized in violation of the state (but not the federal) constitution, California police academy materials and legal sourcebooks affirmatively encouraged officers to ignore the state constitutional prohibition on certain searches. *See* David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 Ohio St. J. Crim. L. 567, 580-81 (2008).

This Court, of course, is familiar with the ways in which limits on the exclusionary rule may translate into official police policy designed to circumvent

constitutional rules. *See*, *e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 609-10 (2004) (discussing local and national police-training materials advocating the withholding of *Miranda* warnings before first confession because second confession may be admitted into evidence). Such cases confirm the wisdom of the Court's original insight that the substantive guarantees of the Fourth Amendment are inextricably linked to the exclusionary rule. *See*, *e.g.*, *Weeks*, 232 U.S. at 393. In the absence of an exclusionary sanction, police officers may come to believe—or be trained to believe—that substantive Fourth Amendment rules need not be obeyed. If unconstitutionally seized evidence can be used to secure confessions, then it becomes all too easy for police officers to go from asking themselves, "what does the Fourth Amendment require?" to asking, "what will the courts allow me to get away with?" Stewart, *supra*, at 1403; *see also Terry*, 392 U.S. at 13 ("admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence").

C. Alternative Remedies For Fourth Amendment Violations Are Inadequate.

Despite the theoretical availability of certain alternative remedies, the exclusionary rule remains what it was in 1961, when *Mapp* was decided: a necessary remedy, without which the Fourth Amendment would become "an empty promise." *Mapp*, 367 U.S. at 660.

In *Mapp*, this Court surveyed the legal landscape in non-exclusionary rule states, and correctly concluded that Fourth Amendment remedies other

than the exclusionary rule had proven "worthless and futile." 367 U.S. at 652. The exclusionary rule, the Court recognized, "compel[s] respect for the constitutional guaranty in the *only effectively available way*—by removing the incentive to disregard it." *Elkins*, 364 U.S. at 217 (emphasis added); *see also* Roger Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 Duke. L.J. 319, 321-22 (1962) ("It became impossible to ignore . . . that illegal searches and seizures [pre-*Mapp*] were also a routine procedure subject to no effective deterrent; else how could illegally obtained evidence come into court with such regularity?").

The Court suggested in *Hudson* that civil remedies, expanded since the time of *Mapp*, might now suffice to deter Fourth Amendment violations. *Hudson*, 547 U.S. at 598. That assessment is overly optimistic. Civil remedies may have improved over time, but they remain inadequate to the task of effective deterrence. Qualified immunity defenses bar recovery against officers unless it can be shown that they violated "clearly established" law, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and municipalities cannot be held liable unless a constitutional violation results from official policy or custom, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); *see also* Amicus Br. of ACLU. Indeed, the same experts cited by the Court in *Hudson*, *see* 547 U.S. at 597-98, conclude that recent doctrinal developments in civil rights damages actions only confirm that "the exclusionary rule is essential to deter police misconduct in search and seizure cases." Michael Avery, David Rudovsky & Karen Blum, Police Misconduct § 2:24 n.20 (3d ed. 2007).

As a practical matter, potential plaintiffs, many of whom will not appear terribly sympathetic to juries, lack both incentives and resources to litigate civil rights claims. They face uncertain and limited damages, and even when they prevail, may find it difficult to collect from individual officers. *See* Saul Levmore & William J. Stuntz, *Remedies and Incentives in Public and Private Law: A Comparative Essay*, 1990 Wis. L. Rev. 483, 490-91 (1990). And damages remedies, unlike the exclusionary rule, do not act directly on the political incentives most important to police officers. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. Chi. L. Rev. 345, 417 (2000). In short, there is no reason to believe that civil remedies can substitute for the exclusionary rule in terms of deterrence. *See Hudson*, 547 U.S. at 610-11 (Breyer, J., dissenting).

Nor is there reason to believe that "the increasing professionalism of police forces, including a new emphasis on internal police discipline," *Hudson*, 547 U.S. at 598, can fill that role. Simply as a matter of logic, that suggestion from *Hudson* makes no sense: The "increasing professionalism of police forces" is a direct *result* of application of the exclusionary rule, *see supra* at 8-13, and it cannot simply be assumed that improvements brought about by the exclusionary rule will survive if the rule itself is abandoned. In any event, research indicates that positive police professionalism requires active judicial oversight, including the exclusionary sanction. As found by criminologist Samuel Walker, on whose research *Hudson* relied, *see* 547 U.S. at 599, "the results [of studies] reinforce the Supreme Court's continuing importance in defining constitutional pro-

tections for individual rights and requiring the appropriate remedies for violations, *including the exclusion of evidence*." Samuel Walker, Op-Ed, L.A. Times, June 25, 2006, at M5 (emphasis added). And police professionalism is only as good as the content of professional norms: Police officers can be trained to respect constitutional rules, but they also can be trained to circumvent them. *See, e.g.*, *Seibert*, 542 U.S. at 609-11 & nn. 2-3 (describing professional training materials encouraging interrogation practices that would evade *Miranda*'s protections). The exclusionary rule remains necessary to shape the professionalism of the police.

Finally, there are no grounds for concluding that the "internal police discipline" referred to in *Hudson* can render the exclusionary rule unnecessary. The literature makes clear that internal discipline procedures are too rarely invoked and too often ineffective to have a systemic deterrent effect. *See*, *e.g.*, Donald Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. Mich. J.L. Ref. 591, 629 (1990) (infrequency of federal internal disciplinary investigations for Fourth Amendment violations); Sklansky, *supra*, at 572-74 (inefficacy of citizen review panels); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753, 787-94 (1993) (inadequacy of internal affairs procedures).

That is not to say, of course, that civil remedies and internal discipline have no role to play in effectuating the guarantees of the Fourth Amendment. "No proponent of the exclusionary rule has suggested that it should act in isolation," A. Kenneth

Pye, *Charles Fahy and the Criminal Law*, 54 Geo. L.J. 1055, 1072 (1966), and alternative approaches to deterrence can and should continue to supplement the exclusionary rule. But the exclusionary rule, even if "by itself inadequate," remains "irreplaceable" as a means of deterring unlawful police behavior. Sklansky, *supra*, at 582**;** *see also Hudson*, 547 U.S. at 603 (Kennedy, J., concurring) ("[T]he continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt.").

II. EVIDENCE UNCONSTITUTIONALLY SEIZED BECAUSE OF POLICE ERROR MUST BE EXCLUDED.

A. The Exclusionary Rule Has Always Applied To Errors Committed By The Law Enforcement Team.

1. The point of the exclusionary rule, the Court held in *Leon*, is to "deter *police* misconduct," rather than to "punish the errors of judges and magistrates" or other non-law-enforcement personnel. 468 U.S. at 916 (emphasis added). Accordingly, exclusionary rule jurisprudence draws a clear and firm line between members of the law-enforcement team, whose errors are subject to deterrence by way of the exclusionary rule, and others involved in the criminal justice system, such as magistrates and court clerks, whose errors fall outside the scope of the exclusionary rule.

The Court explained this crucial distinction in *Leon*. The exclusionary rule, it reasoned, was historically directed at police officers, and not at those who are neither law-enforcement officers nor "adjuncts to the law-enforcement team." 468 U.S. at

916-17. The Court justified that singular focus on functional grounds: Because the exclusionary rule deters by threatening the suppression of evidence at a criminal trial, it "cannot be expected significantly to deter" those who are not "adjuncts to the law-enforcement team" and thus "have no stake in the outcome of particular criminal prosecutions." *Id.* at 917. Thus, the Court held in *Leon* that the exclusionary rule could not deter, and thus would not apply to, a search rendered unlawful by the error of a magistrate in issuing a search warrant.

The Court applied precisely the same reasoning in *Arizona v. Evans*, in which an unlawful arrest was predicated on a clerical error by a court employee who failed to inform the arresting officer that an outstanding warrant had been quashed. Again, the Court emphasized that "the exclusionary rule was historically designed as a means of deterring *police* misconduct" only. 514 U.S. at 14 (emphasis added). And again, the Court concluded that "[b]ecause court clerks are not adjuncts to the law enforcement team engaged in the often competitive enterprise of ferreting out crime," they have no stake in the outcome of criminal prosecutions and thus cannot be deterred by the suppression of evidence. *Id.* at 15 (internal citation omitted).

2. This case falls squarely on the other side of the line drawn by cases like *Leon* and *Evans*. In this case, the error underlying the unlawful arrest of Herring originated not with a magistrate or a court clerk, but with another law-enforcement agent: a warrant clerk employed by a county sheriff's department, concededly a member or "adjunct" of the "law-enforcement team" who, as the court be-

low recognized, "is to be treated for purposes of the exclusionary rule as a police officer." Pet. App. 8a.

Under the well-established principles laid out in *Leon* and *Evans*, it follows that the exclusionary rule must apply in this case. The original error in question here—the provision of incorrect information about an outstanding arrest warrant—was committed by a functional police officer, precisely the actor at whom the exclusionary rule was traditionally and is today directed. *See Leon*, 468 U.S. at 916; *Evans*, 514 U.S. at 14. And because the warrant clerk is part of the "law-enforcement team," she is as invested in the outcome of criminal prosecutions as any other police officer, and thus fully subject to the deterrent effects of the exclusionary rule. *See Leon*, 468 U.S. at 917; *Evans*, 514 U.S. at 14.

Adhering to the *Leon*/*Evans* line between the "law-enforcement team," on the one hand, and non-law-enforcement personnel, on the other, is critical to the deterrence of police misconduct. Withdrawal of the exclusionary sanction as to the mistakes of law-enforcement agents restores to those agents—the very persons "engaged in the often competitive enterprise of ferreting out crime," *Evans*, 514 U.S. at 15—a significant incentive to engage in improper conduct, or, at the very least, to refrain from expending the time and resources necessary to avoid negligent mistakes. As explained by leading scholar Wayne LaFave, when an underlying error is committed by police personnel, then "the police agency itself is in a position to remedy the situation and might well do so"—but only "if the exclusionary rule is there to remove the incentive to do otherwise." 1 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 18(e)(4), at 313 (2d. ed.

2003). In *Leon* terms, this is not a "context" in which "the exclusionary rule can be modified somewhat without jeopardizing its ability to perform its intended [deterrence] functions." 468 U.S. at 905.

B. The Exclusionary Rule Applies To Cross-Jurisdictional Law-Enforcement Collaborations.

In finding the exclusionary rule inapplicable, the court below relied in part on the fact that law-enforcement agents from two different counties were involved in Herring's unlawful arrest: The warrant clerk who provided the erroneous information was an employee of the sheriff's office in Dale County, Alabama, while the arresting officer was employed by the sheriff's office in neighboring Coffee County. Pet. App. 9a; *see also id.* at 11a-12a. The United States defends the ruling below on similar grounds, arguing that excluding evidence from a prosecution in one county will not significantly deter police misconduct in another. Opp. Cert. 11. In fact, the cross-jurisdictional nature of the police action in this case is wholly irrelevant to application of the exclusionary rule.

1. Under *Leon* and *Evans*, what matters for exclusionary rule purposes is the law-enforcement nature of the personnel responsible for an unlawful search or seizure, not the location of their offices. Dale County's warrant clerk and Coffee County's arresting officer were functioning as members of precisely the same "law-enforcement team," *Leon*, 468 U.S. at 917: an inter-county team working together to bring about Herring's arrest. Indeed, when Dale County's warrant clerk provided information to Coffee County law enforcement, she be-

came just as much an "adjunct[] to the law-enforcement team," *id.*, of *Coffee County* as of Dale County. There is no reason to believe that all members of that law-enforcement team did not share the same interest in the successful outcome of their collective enterprise, meaning that all would be fully subject to the deterrent effects of the exclusionary sanction under *Leon* and *Evans*.

2. This case is not unique. Law enforcement is—for good reason—often a collective enterprise, and that collective enterprise is subject to collective deterrence. Given the collaborative nature of contemporary law enforcement, application of the exclusionary rule serves as a necessary systemic deterrent, influencing actors in departments and agencies throughout the criminal justice community.

2a. As patterns of crime increasingly transcend jurisdictional lines, successful law enforcement has come to depend upon information sharing and operational collaboration among officials at the local, state, and federal levels.

As in this case, law enforcement officers commonly rely on computerized databases operated by different departments or agencies.[4] "In recent years, we have witnessed the advent of powerful, computer-based recordkeeping systems that facilitate arrests in ways that have never before been possi-

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[4] *See, e.g.*, *California v. Willis*, 46 P.3d 898, 900 (2002) (in the course of investigating the defendant, police officer checked three sources—the "department records," "the local criminal justice information system," and "the parole listing"—each of which were managed by a different agency).

ble. The police, of course, are entitled to enjoy the substantial advantages this technology confers." *Evans*, 514 U.S. at 17-18 (O'Connor, J., concurring).

In the aftermath of September 11, 2001, formal initiatives to enhance inter-agency communication and cooperation expanded rapidly, *see* Office of Justice Programs, Justice Information Sharing Initiatives: A White Paper (2004) (documenting information-sharing and integration programs), and one result has been a notable increase in information-sharing systems that aid in cross-jurisdictional police investigations and prosecutions. *See, e.g.*, Petter Gottschalk, *Stages of Knowledge Management Systems in Police Investigations*, 19 Knowledge-Based Sys. 381-87 (2006) (identifying various applications of knowledge management systems to police investigations and law-enforcement operations); Tan Woei Luen, *Knowledge Management in the Public Sector: Principles and Practices in Police Work*, 27 J. Info. Sci. 311-318 (2001) (discussing information management principles and practices in police work).

Information-sharing and other forms of cooperation exist both horizontally across local law-enforcement agencies and vertically among local, state, and federal actors. Police departments across the country now share information about a wide range of policing issues. *See, e.g.*, Int'l Ass'n of Chiefs of Police, Criminal Intelligence Sharing: A National Plan for Intelligence-led Policing at the Local, State and Federal Levels (2002). And federal, state and local law-enforcement agencies coordinate enforcement efforts and general operations, as well as information exchanges. *See*, *e.g.*, Malcolm Russell-Einhorn et al., Federal-Local Law Enforce-

ment Collaboration in Investigating and Prosecuting Urban Crime, 1982-1999, National Institute of Justice, NCJ 201782 (2000) (detailing operational collaboration and enforcement coordination among federal, state, and local agencies); Alexander Weiss, Informal Information Sharing Among Police Agencies, National Institute of Justice (1998) (identifying widespread information-sharing among law-enforcement officials and professional organizations as well as through an informal network of police agencies); William A. Geller & Norval Morris, *Relations between Federal and Local Police*, 15 Crime & Just. 231-348 (1992) (highlighting extensive local and federal cooperation through information exchange, technical assistance, and multi-jurisdictional operational task forces).

Cooperation between police departments in neighboring jurisdictions—as in this case—is especially prevalent, and often seen as essential to effective law-enforcement. Reports of successful cooperation between nearby police departments fill the pages of local newspapers.[5] Many states have developed integrated criminal justice information sys-

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[5] *See, e.g.*, Ben Benton, *Police Cooperation Pays Off*, Chattanooga Times Free Press, Dec. 14 2006, at B2 (county sheriff credited "free flow of information and cooperative effort" between officers in neighboring departments with successful arrest and prosecution); Roger Amsden, *Police Cooperation Helps Nab Armed Robbery Suspects*, Union Leader (Manchester, NH), Oct. 1, 2004, at A8 (police chief identified "good police work with officers from different agencies" sharing information as key to arrest); *Police Cooperation in Region Leads to Solving Robberies*, Conn. Post (Bridgeport), Oct. 7, 2007 (commending local police departments for "sharing information and working collaboratively" to make arrests and fight crime).

tems to aid collaborative law enforcement efforts between local departments. *See, e.g.*, Heather Morton, Integrated Criminal Justice Information Systems, National Conference of State Legislatures (2001), *available at* http://www.ncsl.org/programs/lis/intjust/report01.htm (highlighting the experiences of three states in developing extensive data systems to share policing information across jurisdictions). Police now utilize socioeconomic, crime, and enforcement profiles of various locales to identify communities that are the best candidates for enhanced police cooperation and information sharing. *See* Michael Redmond & Alok Baveja, *A Data-driven Software Tool for Enabling Cooperative Information Sharing Among Police Departments*, 141 Eur. J. Operational Res. 660-678 (2002).

This cooperation across departments and jurisdictions is a necessary part of contemporary law enforcement. Crime does not respect jurisdictional boundaries, and crime prevention should not be unduly limited by those boundaries, either. Interdepartment cooperation is commonplace and in many ways desirable, but carries with it a "corresponding constitutional responsibilit[y]," *Evans*, 514 U.S. at 17-18 (O'Connor, J., concurring), to collectively respect the Fourth Amendment. That duty can be effectuated only by application of the exclusionary rule to the entire law-enforcement team, including members from cooperating departments.

2b. In large part because they operate collectively, law-enforcement officials can be deterred collectively as well. Social-science research confirms what precedent and common sense would suggest: Officers who work together collaboratively, even across jurisdictional lines, become invested in the

common enterprise and are influenced by events that occur in agencies other than their own.

Formal initiatives designed to enhance law-enforcement cooperation have permeated law-enforcement culture. *See*, *e.g.*, Aki Roberts & John M. Roberts Jr., *The Structure of Informal Communication Between Police Agencies*, 30 Policing: Int'l J. Police Strategies & Mgmt. 93-107 (2007) (discussing various forms of communication between police agencies). In part because they work so closely together, the "various parts of the [criminal justice] system [are] so interdependent, the resources allocated in such a fashion that attempts to change any one part, to control any one decision point, affect[s] the others." Lloyd E. Ohlin, *Surveying Discretion by Criminal Justice Decision Makers*, *in* Discretion in Criminal Justice: The Tension Between Individualization and Uniformity 7-8 (Lloyd E. Ohlin & Frank J. Remington, eds. 1993) ("Ohlin & Remington"). It is therefore "imperative to view all operations by [law-enforcement] agencies as part of an intricate . . . system" with interdependent parts, always cognizant of the "effect that decision making at one point in the system has on operations at another point." Herman Goldstein, *Confronting the Complexity of the Policing Function*, in Ohlin & Remington, 37-38, 58-59.

It is not surprising, then, that many courts have concluded that because law enforcement operates collectively, it also will respond collectively to the incentives of the exclusionary rule. In *Shadler v. State*, 761 So. 2d 279 (2000), for instance, the Florida Supreme Court applied the exclusionary rule to evidence illegally obtained by a police officer as a result of an error by the Department of Highway

Safety. Relying on the integrated nature of state law-enforcement efforts, the court held that the exclusionary sanction would affect the behavior of the Department despite the fact that it would not directly "bear the brunt," Opp. Cert. at 11, of suppression:

> [W]e conclude that the exclusion of evidence . . . will surely serve to encourage accurate record-keeping of driver's license information . . . . Because the Department of Highway Safety is responsible for the related law enforcement functions of agency record-keeping and monitoring traffic offenses and crime on the state's highways, there is an institutional obligation as well as a direct mechanism for feedback from fellow employees to communicate the effect of the exclusionary rule.

Shadler, 761 So. 2d at 285-86. Similarly, the Supreme Court of California explained in *Willis* that because parole officers "often work hand in hand with the police" and act "with a unity of purpose" in the investigation of crime, "the threat of exclusion can be expected to alter [their] behavior." 46 P.3d at 908-09; *see also id.* at 912-13 (applying same reasoning to Department of Corrections data-entry clerks); *Nebraska v. Hisey*, 723 N.W.2d 99, 110 (Neb. Ct. App. 2006) (because state Department of Motor Vehicles is "closely related to law enforcement . . . and is integral to enforcement of the laws concerning motor vehicles . . . . [w]e find that the threat of exclusion of evidence will likely encourage DMV employees charged with recording and trans-

mitting information on license impoundments to exercise greater caution").

3. This Court has never suggested that cooperating law-enforcement personnel employed by different departments can avoid application of the exclusionary rule simply by dividing responsibilities between themselves. Indeed, the Court has indicated just the opposite: that cooperating law-enforcement personnel are to be treated as a single collective whole for Fourth Amendment purposes. *See*, *e.g.*, *United States v. Hensley*, 469 U.S. 221, 231 (1985) (imputing knowledge justifying a seizure held by any one officer or department to all other law-enforcement personnel working on the same investigation).

Nor has the Court hesitated to apply the exclusionary rule to collaborating actors and agencies working together in a law-enforcement capacity. The exclusionary rule should apply to collaborating law-enforcement agents from neighboring counties just as it does to evidence gathered by police officers and later used by prosecutors, *Mapp*, 367 U.S. 643 (excluding evidence illegally obtained by state law-enforcement officials); evidence gathered by an officer executing a warrant obtained by a different officer, *see Leon*, 468 U.S. at 918 n.24 (lack of objective reasonableness by any involved officer, including officer executing warrant sought by colleague, will lead to suppression); and, before *Mapp* extended the exclusionary rule to the states, to evidence gathered by state officials that federal prosecutors sought to introduce in federal proceedings, *see Elkins*, 364 U.S. at 208.

The contrary rule proposed by the court of appeals and the United States would effectively except from exclusion evidence unconstitutionally seized as a result of police error or misconduct, so long as the search or seizure itself is executed by a collaborating officer from another jurisdiction. But there is no reason why the exclusionary rule should not apply to a law-enforcement collaboration simply because an error originates in one jurisdiction and bears fruit in another. Pegging application of the exclusionary rule to jurisdictional boundaries would only create an artificial boundary within what is functionally a single law-enforcement team. *See supra* at 20-21 (applying *Leon* and *Evans*).

Moreover, any such limitation on the exclusionary rule would create significant and perverse incentives for police officers to engage in "working arrangements" that would allow circumvention of Fourth Amendment protections. *See Mapp*, 367 U.S. at 658 ("Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of 'working arrangements' whose results are equally tainted."). An officer who knows that his own jurisdiction's arrest-warrant records are poorly maintained, for instance, might ask colleagues in different jurisdictions to make stops based on those records; if a record proves to be erroneous, evidence stemming from the stop might still be admitted in court. Even the potential for such "working arrangements" should be unacceptable. As LaFave explains:

> [I]t is undeniable that if police officers lacking reasonable suspicion or probable cause may nonetheless bring about *Terry* stops and full-fledged arrests, respectively,

> merely by getting some other officer [in a different jurisdiction] to do the dirty work, and may then use any incriminating evidence obtained incident to such unjustified seizures, the day will have finally arrived when the Fourth Amendment is truly nothing more than 'a form of words.'

LaFave, *supra*, §1.8(e)(4), at 315 (internal quotation omitted).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PAMELA HARRIS
Counsel of Record
Co-Chair, Amicus Committee
NACDL
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

WALTER DELLINGER*
HARVARD LAW SCHOOL
SUPREME COURT AND
APPELLATE PRACTICE CLINIC

* *May be contacted at O'Melveny & Myers LLP*

JOSEPH BLOCHER**
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
(202) 383-5300

** *Not admitted in D.C.; supervised by principals of the firm*

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